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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

NO. 73-1765

SYLVIA MEEK, *et al.*, *Appellants*

v.

JOHN C. PITTINGER, *et al.*, *Appellees*

and

JOSE DIAZ, *et al.*, *Appellees*

and

JOHN P. CHESIK, *on his own behalf and on behalf of his daughter*, EMILY, *et al.*, *Appellees*

BRIEF OF APPELLEES CHESIK, *et al.*

On Appeal From the United States District Court for the Eastern District of Pennsylvania

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BRIEF OF APPELLEES CHESIK, et al.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in part:

> "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof . . ."

Acts 194 and 195 are set forth in the Appendix to the Jurisdiction Statement.

QUESTIONS PRESENTED

1. Do Acts 194 and 195, which extend to nonpublic school children certain secular, neutral and non-ideological educational benefits (remedial tutoring, textbooks, educational aids, etc.) which are presently available to public school children, violate the Establishment Clause?

2. Have plaintiffs met their burden of proving that the Acts, as applied, differ from their stated secular legislative purpose, i.e., to aid all children of the Commonwealth "to develop to the fullest their intellectual capacities"?

STATEMENT OF THE CASE

I. The Statutes Involved

Pennsylvania Acts 194 and 195 which became law on July 12, 1972, amended Pennsylvania Public School Code of 1949[1] to extend to nonpublic school children through pre-existing administrative units (called intermediate units) of the State Department of Education certain secular, neutral and non-ideological educational benefits which were already available to children in public schools.[2] Under

1. 24 P.S. §§1-101 to 27-2702.

2. The Legislative Findings & Declaration of Policy for Act 194 state:

"a) Legislative Finding; Declaration of Policy. The welfare of the Commonwealth requires that the present and future generations of school age children be assured ample opportunity to develop to the fullest their intellectual capacities. To further this objective, the Commonwealth provides, through tax funds of the Commonwealth, auxiliary services free of charge to children attending public schools within the Commonwealth. Approximately one quarter of all children in the Commonwealth, in compliance with the compulsory attendance provisions of this Act, attend nonpublic schools. Although their parents are taxpayers of the Commonwealth, these children do not receive auxiliary services from the Commonwealth. *It is the intent of the General Assembly by this enactment to assure the providing of such auxiliary services in such a manner that every school child in the Commonwealth will equitably share in the benefits thereof.*" (Emphasis added) (Appendix to Jurisdictional Statement 108a-109a) (Henceforth references to the Jurisdictional Statement will be designated JS 1a, etc.)

Those for Act 195 state:

"a) Legislative Findings; Declaration of Policy. The welfare of the Commonwealth requires that the present and future generations of school age children be assured ample opportunity to develop to the fullest their intellectual capacities. To further this objective, the Commonwealth provides, through tax funds of the Commonwealth, textbooks and instructional materials free of charge to children attending public schools within the Commonwealth. Approximately

these Acts, no payment is made directly to any school, and the benefits provided to nonpublic school children are the same as those for public school children.[3]

The specific benefits which these Acts extend to all school children within the Commonwealth of Pennsylvania are:

(1) *auxiliary services*—i.e., special tutoring in basic learning skills;[4]

(2) *loan of textbooks* "which are acceptable for use in any public, elementary or secondary school";[5]

(3) *loan of instructional materials*—i.e., "secular, neutral, non-ideological" materials "as are of benefit to the instruction of nonpublic school children and

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Note 2—*Continued*

one quarter of all children in the Commonwealth, in compliance with the compulsory attendance provisions of this act attend nonpublic schools. Although their parents are taxpayers of the Commonwealth, these children do not receive textbooks or instructional materials from the Commonwealth. *It is the intent of the General Assembly by this enactment to assure* such a distribution of such educational aids *that every school child in the Commonwealth will equitably share in the benefits thereof.*" (Emphasis added) (JS 112a-113a).

3. Under various provisions of the Code, the Commonwealth furnishes auxiliary services to pupils attending public schools. See 24 P.S. §§9-951-9-971. The Commonwealth also furnishes textbooks, instructional materials, and instructional equipment to pupils attending public schools. See *e.g.* 24 P.S. §§8-801, 8-807.1.

4. Act 194 defines auxiliary services as follows:

'Auxiliary services' means (1) *guidance*, (2) *counseling and testing services*; (3) *psychological services*; (4) *services for exceptional children*; (5) *remedial and therapeutic services*; (6) *speech and hearing services*; (7) *services for the improvement of the educationally disadvantaged* (such as, but not limited to, teaching English as a second language), and such other *secular, neutral, non-ideological services* as are of benefit to nonpublic school children and *are presently or hereafter provided for public school children* of the Commonwealth." (Numbers and emphasis added for clarity)

5. Act 195, §(b), JS 114a.

are presently or hereafter provided for public school children of the Commonwealth";[6] and

(4) *instructional equipment* which is "secular, neutral, non-ideological," not capable of diversion to sectarian uses, and "presently or hereafter provided for public school children of the Commonwealth."[7]

II. The Pleadings, the Record, and the Decision Below

A. *The Pleadings*

Plaintiffs' complaint attacks Acts 194 and 195 as unconstitutional on their face and as applied in violation of the Establishment and Free Exercise[8] Clauses of the First Amendment.

Plaintiffs filed motions for a temporary restraining order and a preliminary injunction. The application for a temporary restraining order was denied by a duly constituted three judge court.

B. *Trial on the Merits*

On September 10, 1973, the lower court heard testimony and received evidence on the merits concerning the operation, purpose and effect of the Acts.

Plaintiffs' only witness on the establishment issue was an employee of the Department of Education, who stated that the Commonwealth, in administering the Acts, does not inquire as to any religious characteristics of schools attended by students eligible for benefits under the Acts, because, by definition,[9] the only requirements of the Acts

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6. *Ibid.* JS 113a-114a.

7. *Ibid.* JS 113a.

8. Appellants have apparently abandoned their Free Exercise claim, and must be deemed to have abandoned their attack on the application of the Acts for lack of evidence.

9. Nonpublic school is defined in Acts 194 and 195 in their respective Sections 1(b), JS 109a and 114a.

are that schools meet the standards for fulfilling the state compulsory education requirements[10] and comply with the provisions of Title VI of the Civil Rights Act of 1964 (Public Law 88-352).

Plaintiffs then rested, asserting that the Acts were unconstitutional on their face and that no evidence of the application of the Acts was necessary. Plaintiffs were afforded the opportunity to supplement the testimony offered on September 10, 1973, but elected to rest on that record.

All of the defendants' witnesses established that the benefits provided by Acts 194 and 195 had not generally been available to nonpublic school children prior to the passage of the Acts, and that the programs, as administered by the Intermediate Units of the Department of Education and the auxiliary services, supplemented by auxiliary equipment, were of invaluable aid and assistance to children in need of such services as remedial reading, speech therapy, and other similar forms of non-ideological, non-religious instruction.

C. *The Decision Below*

The lower court unanimously affirmed the constitutionality of the textbook provision of Act 195, and also, with one Judge dissenting, the constitutionality of the auxiliary services provided by Act 194, and the instructional materials provisions of Act 195.

It also affirmed, with one Judge dissenting, the constitutionality of the provision under Act 195 of instructional equipment "which from its nature is incapable of diversion to a religious purpose" (JS46a), and at the same time, unanimously held unconstitutional those sections providing instructional equipment "capable of diversion to sectarian purposes." (JS46a)[11]

10. Testimony of Czekoski at Appendix p. 48. (Hereafter references to the separate Appendix filed with appellants' brief will be designated A1, etc.).

The majority opinion of the court below in this case correctly applied the precepts set forth in the Opinions of this Court concerning the Establishment Clause of the First Amendment, and the Judgment below should be affirmed.

D. *Appellants Chesik, et al.*

This brief is filed on behalf of Intervenors John P. Chesik, on his own behalf and on behalf of his daughter, Emily; Mrs. Robert Boozer, on her own behalf and on behalf of her daughter, Debra McKissick; and the Springside School, a non-sectarian independent girls' college preparatory school, on behalf of its students, whose fees and expenses are being paid by the Pennsylvania Association of Independent Schools, as the spokesman for all parents of children enrolled in independent[12] schools throughout the Commonwealth.

There are in Pennsylvania, as elsewhere in the country, a host of independent private schools, both sectarian and non-sectarian in addition to Catholic ones, that are encompassed by the term "nonpublic" schools. The sectarian schools are as varied as the wide range of our ethnic and religious heritage, including such religious groups as the Society of Friends (Quaker), Lutheran, Presbyterian, Episcopalian, Methodist, Jewish, and many others.

11. No appeal was taken from this aspect of the lower court's order and subsequent references in this brief to instructional equipment refer only to such equipment as is incapable of diversion to sectarian uses.

12. Independent schools make a unique and significant contribution to the American educational system. For further documentation, see Appendix B to Brief of Henry E. Crouter, filed in this court in *Sloan v. Lemon and Crouter v. Lemon*. (October Term, 1972, No. 72-620).

SUMMARY OF ARGUMENT

Acts 194 and 195 extend the same secular, neutral and non-ideological benefits to nonpublic school students through pre-existing administrative bodies that are presently available to public school students. No direct payments are made to any schools.

The court below correctly applied the constitutional criteria under the Establishment Clause of the First Amendment, as set forth in *Lemon v. Kurtzman*, 403 U.S. 612 (1971) and *PEARL v. Nyquist*, 413 U.S. 756 (1973), and its decision should be affirmed. The failure to exclude children attending sectarian schools from the benefits provided by the Acts does not make them unconstitutional.

Far from being an attempt to "evade or outwit" the Establishment Clause as appellants contend, Acts 194 and 195 clearly manifest a secular legislative purpose,—i.e. to improve the educational skills of children.

Plaintiffs below failed to offer any evidence that the primary or principle effect is other than its stated purpose of extending non-sectarian, non-ideological educational opportunities to all school children in Pennsylvania. As the lower court found, the Acts do not provide a special benefit to nonpublic school children which is not available to public school children; the benefits provided are neutral and non-ideological; and, if there is any benefit to religious institutions, it is not direct, but indirect and incidental.

Because of the secular nature of the benefits provided, the Acts do not present the potential for entanglement between the state and religious institutions as did legislation providing for direct payments to religious schools for the core of the educational program where the potential for sectarian influence is so great. Moreover, to provide auxiliary services off the premises of religious schools as appellants suggest would involve more, not less, entanglement.

For these reasons, appellants' arguments that the benefits provided by the Acts subsidize religious institu-

tions and require surveillance to insure secularity must be rejected because the Acts on their face are constitutional and appellants failed in the court below to offer competent evidence to support these charges.

Appellants suggest that this Court reexamine *Board of Education v. Allen*, 392 U.S. 236 (1968). We welcome such a re-examination, for we are certain that *Allen* was based upon sound constitutional principles—and we are equally convinced that the failure to exclude children attending religious schools from the benefits afforded under Acts 194 and 195 violates neither the letter nor the spirit of the Establishment Clause of the First Amendment and is permitted under numerous decisions of this Court.

ARGUMENT

I. Introduction

A. The Importance of Education.

America has had a love affair with education. And rightly so, because from our earliest times, we have recognized that an educated people are free,—and that only through education can we build an informed, enlightened community of people, capable of sharing and distributing power, resources and wealth whereby each can contribute towards the betterment of self and nation.

Henry Peter, Lord Broughman, English statesman, jurist and scientist (1778-1868), has stated the case for education succinctly and well:

> "Education makes a people easy to lead but difficult to drive; easy to govern but impossible to enslave." —"*Familiar Quotations*", John Bartlett, 14th Edn., 1968—p. 540.

Mindful of the extraordinary commitment and dedication of our people to the critical importance of education in American life, we find it incredible that the motives of those in Pennsylvania (and countless other States), who seek a constitutionally valid way to strengthen our nation's commitment to pluralism in education in general, and in particular to improve the educational skills of all children —regardless of race, color or creed—should be impugned, as they have been by the opening pages of appellants' brief, by thinly-veiled charges of deviousness and legislative bad faith.

Furthermore, we reject totally appellants' implied claim that they are the *only* protectors of religious liberty and freedom[13]—and that those including elected representatives in government who support the use of public funds for nonpublic education are the destroyers.

Let the record be clear that we yield to no one in our

13. Mrs. Meek, one of the plaintiffs in this action, testified that she did not practice any religion. (A37)

total commitment to uphold the Establishment and Free Exercise Clauses of the First Amendment. But in so doing, we recognize, as this Court has on many occasions, that there is not and cannot be an absolute wall of separation between church and state in matters affecting such important values as education.

As developed below, the role of the First Amendment in its admonition to government in these critical areas is not, as appellants contend, that of "friend or foe", but rather one of neutrality,[14] to insure that the state does not become involved in opposing or supporting an established church or in the discouraging or advancing of religion.

There is no greater duty and responsibility on a democratically constituted government than to insure the development of the educational skills in its young people. As stated by this Court in *Board of Education v. Allen*, 392 U.S. 236 at 247 (1968):

> "Americans care about the quality of the secular education available to their children. They have considered high quality education to be an indispensable ingredient for achieving the kind of nation and the kind of citizenry, that they have desired to create."

And as noted in *Everson v. Board of Education*, 330 U.S. 1 (1947):

> "It is much too late to argue that legislation intended to facilitate the opportunity of children to get a secular education serves no public purpose." 330 U.S. at 7.

We respectfully ask this Court to rule that plaintiffs have failed utterly to meet the heavy burden thrust on anyone who would ask this Court to invalidate state action; and that the declared purpose and proved effect of the instant legislation is to advance education, not religion,

14. *Committee for Public Education (PEARL) v. Nyquist*, 413 U.S. 756 at 793 (1973); *Walz v. Tax Commission*, 397 U.S. 664 at 669 (1970).

by extending to children attending nonpublic schools the same nonsectarian, nonideological, self-policing educational opportunities in the form of remedial help, textbooks, and educational equipment as are currently available to children in the state public schools.

B. The Acts Are Constitutional.

Acts 194 and 195 extend certain benefits to nonpublic school children within the Commonwealth of Pennsylvania; these benefits are identical to those previously provided to public school children throughout the Commonwealth. Furthermore, the benefits are provided by the same administrative units and personnel which provide them for the public school system, that is, the intermediate units.

As discussed below, these Acts meet the requirements of recent decisions of this Court and avoid the pitfalls of legislation previously invalidated.

The appellants purport to attack the Acts on their face, and seek to reverse the court below on the grounds that:

- ¶ the benefits provide a subsidy to religious schools;
- ¶ the state must provide continued surveillance to insure secularity.

But appellants have failed totally, after a full evidentiary hearing on the merits, to establish any facts in support of their charges that the purpose or effect of these Acts is to advance religion.

Appellants have the burden, which is a heavy one,[15] to establish evidence of unconstitutionality. They have not met this burden. They offered no evidence to show that the Acts in operation differed from their stated legislative purpose. They offered no evidence that the purpose or effect was to advance religion.

Moreover, their argument is replete with certain factual assumptions, none of which are supported by the record in this case.

15. *Lenhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356 (1972) *reh denied*, 411 U.S. 910.

C. Failure to Exclude Children Attending Religious Schools from the Benefits of the Acts Does Not Violate the Establishment Clause.

Stripped of all rhetoric, appellants' basic attack rests on the erroneous premise that the Acts are constitutionally deficient because there is no restriction to prohibit extending these benefits to children attending religious schools.

Appellants cite no authority for such an unwarranted position—and understandably, since this Court in *Everson* and *Allen* ruled just to the contrary. As noted in *Everson*:

> "[The state] cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it*, from receiving the benefits of public welfare legislation. (emphasis in original). While we do not mean to intimate that a state could not provide transportation only to children attending public schools, *we must be careful, in protecting the citizens of New Jersey against state-established churches, to be sure that we do not inadvertently prohibit New Jersey from extending its general state law benefits to all its citizens without regard to their religious beliefs.*" (emphasis added) 330 U.S. at 16.

In this case, the Pennsylvania legislature has extended general state law benefits to all citizens without regard to their religious beliefs[16] and in so doing, the legislation provided is clearly constitutional.

16. As noted below in Section II B(2) there is not a scintilla of evidence to support the contention that any of the schools attended by children eligible for the benefits of Acts 194 and 195 have any of the religious criteria or profile to which appellants refer in their brief at pages 4, 17-18.

Furthermore, as discussed in Section IV B below, any effort on the part of the state to make such inquiry would be violative of the free exercise rights of the parents and their children.

As noted in *Allen*, 392 U.S. at 247, underlying the cases is the recognition by this Court that private education, including sectarian schools, performs the function of providing secular education to a substantial body of the state's school-age children. The Pennsylvania legislature has, through Acts 194 and 195, attempted to extend to all students certain benefits or tools so that they can more readily learn the secular subjects and communication skills in which the state has such an interest as to justify compulsory education.

Recent decisions of this Court have reaffirmed that while a state *has the power* to extend its general state law benefits to all of its citizens without regard to their religious beliefs, it is *not required* to do so. *Luetkemeyer v. Kaufmann*, — U.S. — (No. 73-1612, decided October 21, 1974) and *Brusca v. State Board of Education*, 405 U.S. 1050 (1972), *aff'g*, 332 F. Supp. 275 (E.D. Mo. 1971). We are not here arguing that the state is constitutionally required to extend these benefits. In this case they have elected to do so. Based on the authorities discussed above, this is clearly within the state's prerogative and appellants' efforts to block it should be rejected.

Furthermore, as developed in section IV, C below, inquiry into the religious practices, if any, of schools attended by children eligible for benefits under Acts 194 and 195, would violate their constitutional rights.

II. The Lower Court Correctly Applied the Precepts of this Court.

The majority opinion of the court below correctly applied the decisions of this Court concerning the Establishment Clause of the First Amendment.[17]

17. The lower court applied the criteria set forth by Mr. Chief Justice Burger in *Lemon v. Kurtzman*, 403 U.S. 602 (1971):

"First, the statute must have a secular legislative purpose;

A. *Primary Purpose*

It is clear, as the court below found that the legislative recitals set forth in footnote 2 above indicate a proper secular purpose.[18]

Appellants insist, however, that the legislative motivation behind the Acts is to "evade or outwit" the Establishment Clause and attempt to support this argument by pointing to previous Pennsylvania legislation held unconstitutional by this Court, *Lemon v. Kurtzman* (purchase of services) and *Sloan v. Lemon* (parent reimbursement for tuition). (See Appellants' brief, p. 10).

However, this Court held that the legislation in both *Lemon v. Kurtzman* and *Sloan v. Lemon* had the requisite secular legislative purpose,[19] and certainly the stated legislative purpose of Acts 194 and 195 is equally secular.[20]

If appellants now contend that the effect of the Acts is other than their stated purpose, they have failed to offer any evidence to support such a contention.

B. *Primary Effect. The Pennsylvania Acts Meet the Criteria of PEARL v. Nyquist and Sloan v. Lemon.*

After analyzing the various opinions in this Court con-

Second, its principal or primary effect must be one that neither advances nor inhibits religion; *Board of Education v. Allen*, 392 U.S. 236, 243 (1968);

Finally, the statute must not foster 'an excessive government entanglement with religion.'" 403 U.S. at 612-613. (paragraphs supplied for clarity)

18. The legislative declarations of purpose of Acts 194 and 195 are compeltely different from those in *Lemon v. Kurtzman*, *supra*, *PEARL v. Nyquist*, 413 U.S. 756 (1973), and *Sloan v. Lemon*, 413 U.S. 825 (1973) where the legislative purpose was to preserve pluralism in response to the crisis in nonpublic schools created by rapidly rising costs.

19. *Lemon v. Kurtzman*, *supra*, 402 U.S. at 613; *Sloan v. Lemon*, 413 U.S. 825 at 829-830 (1973).

20. The legislative purpose of the Acts is almost identical to those in *Everson*, *supra*, and *Board of Education v. Allen*, 392 U.S. 236 (1968).

cerning primary effect (JS 17a *et seq.*)[21] the court below held that the provisions of the Acts here on appeal did not have the primary effect of advancing religion.

The decision below should be affirmed because the evidence establishes that:

¶ The primary purpose and effect of the Acts is to aid and improve the educational skills of children.

¶ The Acts are not the kind of "class legislation" and special benefit condemned by the majority in *PEARL v. Nyquist, supra,* 413 U.S. at 794 and related cases. The full record establishes that the purpose and effect of Acts 194 and 195 is to extend to children attending nonpublic schools, some of the same secular educational benefits currently given to children attending public schools.

¶ The textbooks, educational services and related equipment are for the direct and sole benefit of the children—and no funds are given to any religious order or institution.

This Court, in its opinion in *PEARL v. Nyquist* and *Sloan v. Lemon*, analyzed in depth the limits of permissible state aid for education which does not have the primary effect of advancement of religion. It laid down a four-fold test which, among other things, totally rejects the subsidy argument advanced by appellants.[22]

To pass constitutional muster under the foregoing cases, the projected state aid

¶ must not be class legislation; and must be

21. *PEARL v. Nyquist*, 413 U.S. 756 (1973); *Levitt v. Committee for Public Education & Religious Liberty (PEARL)*, 413 U.S. 472 (1973); *Sloan v. Lemon*, 413 U.S. 825 (1973); *Board of Education v. Allen*, 392 U.S. 236 (1968); *Walz v. Tax Commission*, 397 U.S. 664 (1970); *Tilton v. Richardson*, 403 U.S. 672 (1971), and *Hunt v. McNair*, 413 U.S. 472 (1973).

22. See Mr. Justice Powell's opinion for the Court in *Hunt v. McNair* quoted below at page 24.

¶ indirect,
¶ incidental, and
¶ neutral, non-ideological.[23]

Acts 194 and 195 clearly meet all these tests.

(1) *This Is Not Class Legislation*

The constitutional infirmity that the majority found in *Sloan v. Lemon* was that a special benefit—i.e., tuition reimbursement, which carried with it absolute freedom of choice of school—was conferred on parents of nonpublic school children which was *not* available to parents of public school children. And since it appeared that a majority of the children and families benefited were those attending church related schools, the legislation was struck down as being class legislation having the impermissable effect of advancing religion. The present legislation is fundamentally different and has no such infirmity. Here the Acts merely extend to children attending nonpublic schools, some of the benefits which are presently available to children attending public schools.[24]

23. As stated by Mr. Justice Powell in *PEARL v. Nyquist, supra*, 413 U.S. at 775.

> "These cases simply recognize that sectarian schools perform secular, educational functions as well as religious functions, and that some forms of aid may be channeled to the secular without providing direct aid to the sectarian. But the channel is a narrow one, as the above cases illustrate. Of course, it is true in each case that the provision of such neutral, non-ideological aid, assisting only the secular functions of sectarian schools, served indirectly and incidentally to promote the religious function by rendering it more likely that children would attend sectarian schools and by freeing the budgets of those schools for use in other non-secular areas. *But an indirect and incidental effect beneficial to religious institutions has never been thought a sufficient defect to warrant the invalidation of a state law.*" (emphasis supplied).

24. Mr. Justice Powell has stated this court's concern that no *special* aid be given to those who support nonpublic schools:

Moreover, the Acts themselves define the benefits in terms of those available to public school students. Thus, by definition no special benefit is made available to one class, nonpublic students, which is not generally available to public school students.

(2) *The Benefits, if Any, to Religiously Affiliated Institutions Are Indirect.*

Acts 194 and 195 provide no direct payments to any schools in Pennsylvania. There is, therefore, no possibility of any direct financing of religion or religious education. These Acts are therefore distinguishable from those cases where payments were made directly to nonpublic schools[25] and come within the long, unbroken line of cases stating that legislation which provides only an indirect or incidental benefit to religious institutions is not unconstitutional.[26]

But appellants ignore the constitutionally significant difference between direct and indirect benefits to religious institutions. They insist that the Acts provide tax funds for

Note 24 -*Continued*

"We think it plain that this [i.e. tuition reimbursement to parents] is quite unlike the sort of 'indirect' and 'incidental' benefits that flowed to sectarian schools from programs aiding *all* parents by supplying bus transportation and secular textbooks for their children. (emphasis in original) *Such benefits were carefully restricted to the purely secular side of church-affiliated institutions and provided no special aid for those who had chosen to support religious schools.* (emphasis added)." *Sloan v. Lemon, supra* at 832.

25. 1) *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (purchase of secular educational instruction in traditional subjects) involved *direct* grants to schools which the court held required extensive surveillance to insure non-sectarian teaching.

2) *PEARL v. Nyquist*, 413 U.S. 756 (1973) likewise involved direct money for grants for maintenance and repair of buildings, with no way to separate between religious and non-religious use.

3) *Levitt v. PEARL*, 413 U.S. 472, provided direct grants to nonpublic schools for testing and teacher prepared tests, but the grants were unrelated to actual cost.

26. *PEARL v. Nyquist*, 413 U.S. 756, 775 (1973); *Sloan v. Lemon*, 413 U.S. 825, 832 (1973); *Hunt v. McNair*, 413 U.S. 734, 742-743 (1973); *Norwood v. Harrison*, 413 U.S. 455, 468 (1973); *Tilton v. Richardson*, 403 U.S. 672, 679 (1971); *Walz v. Tax Commission*, 397 U.S. 664, 671 (1970); *Board of Education v. Allen*, 392 U.S. 236, 244 (1968); *Everson v. Board of Education*, 330 U.S. 1, 17 (1946) and see *McGowan v. Maryland*, 366 U.S. 420, 442-443 (1961); *Zorach v. Clauson*, 343 U.S. 306, 314 (1952); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); and *Bradford v. Roberts*, 175 U.S. 291 (1899).

the support of religious schools (appellants' brief, pp. 4, 10 and see pp. 8, 14 et seq.), including schools having the characteristics described in paragraph 8[27] of their complaint.

There is absolutely no factual basis for appellants' assertion (See appellants' brief, p. 4) that appellees concede that schools with those stated characteristics are eligible for benefits under the Acts.

At trial, counsel for plaintiffs attempted and failed to get such evidence in the record. (See A42-A43). Appellants admit that there is no basis in the record for the assertion that any Pennsylvania school has such characteristics when they admit that these characteristics were culled from references in various opinions of this Court concerning legislation which provided for direct payment of funds to nonpublic schools, *e.g., Tilton v. Richardson*, 403 U.S. 672 (1971); *Lemon v. Kurtzman*.[28]

27. The allegations of paragraph 8 were denied. (See Answer of Pittinger A27, Answer of Diaz A30).

28. In *Tilton, supra*, appellants argued that the legislation there under consideration (direct grants for construction of secular buildings) was invalid in that it provided aid to institutions having the same characteristics as are alleged in paragraph 8 of the complaint in this action. This court noted that there was no evidence in the record that any of the institutions there under attack had such characteristics, and stated

"We cannot, however, strike down an Act of Congress on the basis of a hypothetical 'profile.'" 403 U.S. at 682.

Similarly, here, this Court should refuse to strike down Acts 194 and 195 on the basis of the same hypothetical profile, particularly since here, as in *Tilton*, the asserted characteristics have no factual basis from the record in this case.

What the record does show is that there are no disqualifying criteria in the Acts that would preclude children attending religiously-oriented schools from qualifying for benefits; and that the state does not inquire into whether the children attend religiously affiliated schools, but only into whether each school fulfills the compulsory education requirements.[29] (See A42, A46).

In any event, the religious characteristics alleged in paragraph 8 of plaintiffs' complaint are not relevant in the situation here, where no direct payments are made to any school; and the benefits, if any, to a nonpublic school are indirect and incidental. (See also Section I C above).

(3) *The Benefits Are Incidental.*

It is clear that benefits afforded by Acts 194 and 195 are incidental in that they do not relate to the principal content of the general educational program, but rather provide the tools—in form of textbooks,[30] instructional materials, etc. and special remedial help (hearing and speech therapy, etc.) to improve the childrens' basic communication skills from which the content can be acquired.[31]

29. The state has the duty to ascertain that all nonpublic schools meet certain requirements so as to qualify to fulfill the state requirements of compulsory education of all children in the Commonwealth. See *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). Furthermore, as discussed below in Section IV B, any further inquiry into religious practices would violate the parents' and their children's constitutional rights.

30. Textbooks of course do relate to the core of educational content, but they are still only the tools of the educator. They are "incidental" in both *cost* and *educational importance* compared to the role of the classroom teacher.

Furthermore, textbooks are self policing in insuring secular content since the only textbooks that qualify under the Act are those which are "acceptable for use in any public . . . school".

Finally, textbooks have been held clearly valid under *Allen*, and see *Norwood v. Harrison*, *supra*.

31. As noted by Judge Gibbons in the opinion below (JS 36a), there is always a possibility that any program that improves communication skills in children might have some indirect effect on religion (i.e. that a child with glasses will be enabled to read the Bible), but such an incidental benefit does not constitute impermissible advancement of religion.

(4) *The Benefits Afforded by Acts 194 and 195 Are Neutral and Non-ideological.*

All of the benefits provided under Acts 194 and 195 are by definition (See Section C below) secular, neutral and non-ideological, and thus by their very nature, the benefits are self-policing and do not require surveillance to insure secularity.

C. *The Acts Do Not Foster Undue Entanglement.*

1. *Acts 194 and 195 Are Self-policing and Surveillance Is Not Required.*

As noted in sections (3) and (4) above, appellants complain, but without supporting evidence, that comprehensive and continuing surveillance is necessary to insure neutrality. (appellants' brief, pp. 19, 25, 27). This is just not so.

By definition, all the benefits provided under the Acts are neutral, secular and non-ideological,[32] and self-policing.[33] Plaintiffs below offered no evidence to the contrary, nor could they. Moreover, the Acts define the benefits in terms of those available to public school students,[34] and the Acts are administered by the same people

32. The definition of auxiliary services in Act 194 (see footnote 4 above) limits the benefits to "secular, neutral, non-ideological services." Act 195 defines instructional equipment as "educational, secular, neutral, non-ideological equipment," which is not susceptible to diversion to sectarian uses. Instructional materials include only "secular, neutral, non-ideological materials."

33. As noted in *Lemon v. Kurtzman*, 403 U.S. at 617:

> "In terms of potential for involving some aspect of faith or morals in secular subjects, a textbook's content is ascertainable, but a teacher's handling of a subject is not."

34. Auxiliary services are by definition only services which "are presently or hereafter provided for public school children of the Commonwealth." Instructional equipment and machinery are likewise limited by definition to items which "are presently or

who provide the same services, materials and equipment to the public schools.

Furthermore, there is no evidence that the administrative contact between the state and nonpublic schools is any greater than prior to the passage of the Acts when there already were requirements relating to the state's compulsory education requirements, health and safety regulations, etc.[35]

This Court has acknowledged—contrary to appellants' assertion (e.g., appellants' brief, p. 30)—that the Constitution does not and cannot require absolute separation between church and state. Some contact is inevitable. Thus, only "excessive" or undue entanglement is prohibited by the First Amendment.

As noted by this Court in *Lemon v. Kurtzman*, 403 U.S. 602 at 614:

> "Our prior holdings do not call for total separation between church and state; total separation is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable. *Zorach v. Clauson*, 343 U.S. 306, 312 (1952); *Sherbert v. Verner*, 374 U.S. 398, 422 (1963) (Harlan J., dissenting). *Fire inspections, building and zoning regulations, and state requirements under compulsory school-attendance laws are examples of necessary and permissible contacts.* Indeed, under the statutory exemption before us in *Walz*, the state

Note 34—*Continued*

hereafter provided for public school children of the Commonwealth." Textbooks are limited to "textbooks which are acceptable for use in any public, elementary or secondary school of the Commonwealth."

35. *E.g.*, 24 P.S. §13-1327, 24 P.S. §§14-401 to 14-122; Law of March 10, 1949, P.L. 30, Art. XII, Section 1303 (repealed 1972) (Smallpox vaccination). These Acts, unlike the one in *Marburger, supra*, do not require or permit the local school board "to inquire into the religious procedures and curricula of the nonpublic school" 358 F. Supp. at 40, and, therefore, they do not pose the potential for administrative entanglement present in *Marburger*.

> had a continuing burden to ascertain that the exempt property was in fact being used for religious worship. *Judicial caveats against entanglement must recognize that the line of separation, far from being a 'wall' is a blurred, indistinct and variable barrier depending on all the circumstances of a particular relationship.*" (emphasis supplied).

Finally, mere administrative entanglement is not sufficient to invalidate otherwise permissible legislation. *Hunt v. McNair, supra, Cf. Wheeler v. Barrera, supra.*

2. *There Is No Legislative Divisiveness.*

Since the Acts are for the benefit of all the children of the Commonwealth, the potential for political divisiveness on religious grounds referred to in *Lemon v. Kurtzman, supra*, and *PEARL v. Nyquist, supra*, is not present in this case.

III. Rebuttal of Appellants' Contentions—These Acts Do Not Subsidize Religion or Require Undue Entanglement.

A. *Act 194—Auxiliary Services*

Appellants argue that the auxiliary services provided under Act 194 constitute a subsidy and result in undue entanglement (appellants' brief, pp. 14-20).

(1) *Auxiliary Services Provide No Direct Subsidy to Sectarian Schools.*

The central thrust of appellants' subsidy argument is that the provision of auxiliary services subsidizes nonpublic schools including sectarian schools, for expenses which would normally be paid out of the school's operating budget.

As a legal proposition, a majority of this Court in *Hunt v. McNair*, has rejected the argument that substitution of funds may constitute a subsidy of religion. See Mr. Justice Powell's opinion for the Court at page 743:

> "Stated another way, the Court has not accepted the recurrent argument that aid is forbidden because aid to one aspect of an institution frees it to spend its other resources on religious ends."

Neither the record nor a common sense view of the benefits provided support such contention. Here, as in *Allen*,[36] the benefits provided under Act 194 are to children and not to their schools. As noted in the opinion of the court below

> "We hold that none of the specific auxiliary services listed in Act 194 has the primary effect of aiding religion. Each has the primary effect of meeting the state's primary objective of assuring that individual students receive those individualized services, outside the general program of instruction of their school, necessary for their individual progress in learning. It is true, of course, that a child with vision defects, provided glasses, will be enabled to read the Bible, as a child with hearing defects, provided a hearing aid, will be enabled to hear the word of God, and as an emotionally disturbed child, given psychological or medical therapy, may become receptive to religious training. But the benefit to religion in such instances is clearly secondary, and such secondary benefit exists no less for children attending public than for children attending nonpublic schools." (JS 36a).

36. As Mr. Justice White noted,

"The express purpose of §701 was stated by the New York legislature to be a furtherance of the educational opportunities available to the young. Appellants have shown us nothing about the necessary effects of the statute that is contrary to its stated purpose. *The law merely makes available to all children the benefits of a general program to lend school books free of charge*. Books are furnished at the request of the pupil and ownership remains, at least technically, in the state. Thus, no funds or books are furnished to parochial schools, and *the financial benefit is to the parents and children, not to schools*. (footnote omitted)." (emphasis added)

392 U.S. at 243-44.

Plaintiffs insist here, as they did in the court below, that Act 194 "subsidizes the teaching of secular subjects in church schools" (appellants' brief, p. 16), but the Act itself and the Opinion of the court below both make clear that the Act does not subsidize the general instructional programs of nonpublic schools (See Opinion JS 36a-37a).

(2) *Act 194 Does Not Require Undue Entanglement*

Appellants' second contention as to Act 194 is that it requires surveillance since auxiliary services may be provided within the confines and environment of a religious institution. (appellants' brief, p. 19).

As noted above, the remedial specialists do not teach in the general instructional program. At the time of the hearing, the program had been in operation for over a year. Yet plaintiffs produced not a shred of evidence of any entanglement, let alone the kind of "excessive entanglement" as is their burden. Appellants cannot rely now on mere suppositions to hold this Act unconstitutional, but must produce concrete evidence of "excessive" entanglement which runs afoul of the First Amendment. See *Hunt v. McNair, supra*.

Appellants argue that this program suffers the same infirmities as the purchase of secular educational service struck down in *Lemon v. Kurtzman* and the salary supplement held unconstitutional in *DiCenso*. (appellants' brief, p. 20). This is absurd—for the furnishing of auxiliary services under Act 194 bears no resemblance whatsoever to those programs.

- ¶ Under Act 194 no funds are paid to the schools.
- ¶ The services furnished—such as remedial tutoring in hearing, speech and reading, etc., are not part of the central core of the educational program—but are peripheral aids to raise the level of comprehension and expression of the slow learners.
- ¶ Those teachers who perform these services are state employees, paid by the state, and subject to its supervision and control.
- ¶ The services are secular, non-ideological, and self-policing to insure no religious intrusion.

We submit, as the court below found (JS 38a-39a), that psychological testing, speech and hearing therapy and other auxiliary services provided under Act 194 do not have any potential for the kind of religious infiltration or indoctrination, which caused the demise of purchase of educational services in *Lemon v. Kurtzman*.

B. *Act 195—Textbooks*

Appellants argue that the textbook provision of Act 195 should be held unconstitutional, either because *Allen* was decided incorrectly, or because the textbook provision of Act 195 goes beyond the "verge" in *Allen*. As discussed more fully below in Section IV, *Allen* was appropriately and correctly decided.

All appellants' contentions (appellants' brief, pp. 24-25) concerning textbooks relate to the Act *as applied*, and not on its face, and in each instance appellants have failed totally to show that the Act as applied is contrary to its stated purpose.[37] First, far from going substantially beyond *Allen* and the New York statute which it upheld, (appellants' brief, p. 23) the textbook provision of Act 195 operates in a substantially identical manner.[38]

As to surveillance, which appellants assert is required

37. See footnote 30 above.

38. See *Allen*, 392 U.S. at 244, n.6.

(See pp. 24-25), this surveillance is no more than that present in *Allen* or required under Title II of the Elementary and Secondary Education Act, and constitutes a one-time endeavor to ascertain the non-sectarian contents of any requested textbook.

C. *Act 195—Instructional Materials*

Much of the appellants' argument against the instructional materials provided in Act 195 has already been discussed in the sections above concerning textbooks and auxiliary services. Initially we note that the purpose of the Act is not to advance religion, but to make available benefits to nonpublic school children that are presently available for public school children. As the court below found, there is no constitutional significance to the fact that the schools rather than the individual students become the bailees of the materials (JS 45a). There is no evidence of any subsidy and in fact the evidence is to the contrary.

We are shocked that appellants, who declined the opportunity to offer any evidence of unconstitutionality "as applied," would now try to argue from the record in *Earley v. DiCenso* that teachers in sectarian schools are advised to stimulate interest in religious vocations and missionary work. Appellants argue at page 27 of their brief that teachers in religious schools *might* use instructional materials, such as maps and globes, for religious recruiting purposes. (See appellants' brief, p. 27). Putting aside such imaginative and unfounded charges of bad faith, the reference to *DiCenso* has no relevance in this case. In *DiCenso*, the state was unrestrictedly subsidizing parochial school teachers. Here, the State has offered certain neutral, secular, non-ideological instructional materials,[39] under a

39. Act 195 defines instructional materials to include only "secular, neutral, non-ideological books, periodicals, documents, pamphlets, photographs, reproductions, pictorial or graphic works, musical scores, maps, charts, globes, sound recordings, process slides, transparencies, films, filmstrips, kinescopes, and video tapes. (A. 19-20).

program that operates substantially the same as that established for textbooks.

D. *Act 195—Instructional Equipment*

Again, appellants' assertion that the purpose of Act 195 is to help finance the ordinary and everyday expenses of maintaining and operating church schools (appellants' brief, p. 29) is not supported by the stated purpose of the Act, the finding of the court below, or the record in this case.

As to primary effect, appellants claim to be now "certain" (appellants' brief, p. 30) that some of the instructional equipment, such as storage cabinets and carts, is used "to store and move religious materials." But they offered no evidence to support these preposterous charges. Furthermore, as Judge Gibbons aptly noted in the opinion of the court below,

> "Giving free rein to the imagination one could, perhaps, visualize a religious teacher storing holy water in a chemistry laboratory beaker, but as stated in *Tilton v. Richardson, supra*, 403 U.S. at 679:
>
> > 'A possibility always exists, of course, that the legitimate objectives of any law or legislative program may be subverted by conscious design or lax enforcement. But judicial concern about these possibilities cannot, standing alone warrant striking down a statute as unconstitutional.' " (JS 46a)

In *PEARL v. Nyquist*, this Court invalidated *direct* grants to secondary schools for maintenance and repair, where no attempt was made to restrict payments to those expenditures related to the upkeep of facilities used exclusively for secular purposes. Thus, it was possible for a school to pay from state funds for maintenance of the school chapel or renovating classrooms in which religion was taught or the cost of heating and lighting those same facilities. The absence of appropriate restrictions rendered the programs unconstitutional.

Here there is (1) no direct grant to any school, (2) only a very limited category of instructional equipment, i.e. that which is not readily divertible to sectarian use, and (3) in the overall educational scheme, certainly a very incidental and indirect benefit to the school.

IV. Acts 194 and 195 Comport with Sound Constitutional Policy.

As discussed in Section I C above, the failure to exclude children who attend religious schools from the benefits of Acts 194 and 195 does not render those Acts unconstitutional.

A. *This Court Has Recognized and Encouraged the States to Experiment with State Action that May Indirectly Benefit Religious Institutions Without Advancing Religion.*

We are appalled that appellants in their brief at pp. 10 and 30 would criticize and challenge the good faith of those who seek innovative measures[40] to improve the educational skills of children attending nonpublic schools that include religiously sponsored schools.

As noted by Mr. Chief Justice Burger in *Walz v. Tax Commission, supra*, there is "room for play in the joints"—and only by experience, and trial and error, can the proper balance be found:

> "The course of constitutional neutrality in this area [the Establishment and Free Exercise Clauses of the First Amendment] cannot be an absolutely straight line; rigidity could well defeat the basic purpose of these provisions, which is to insure that no religion be sponsored or favored, none commanded and none inhibited.
>
> "The general principle deducible from the First

40. For a ringing statement on the importance of experimentation, see Mr. Justice Brandeis' dissenting opinion in *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932).

Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental inference with a religion.

"Short of those expressly prescribed governmental acts *there is room for play in the joints productive of a benevolent neutrality* which will permit religious exercise to exist without sponsorship and without interference." (emphasis added) 397 U.S. at 669.

Furthermore, this Court has stressed the importance which we as a nation place on religious values[41] and has taken great pains to distinguish between programs that advance religion contrary to the First Amendment, and acts that may indirectly benefit religious institutions as permitted by the First Amendment.[42]

The test, as stressed by Mr. Chief Justice Burger in the Court's Opinion in *Tilton*, is not whether there is an *incidental benefit* to religion—but whether the *primary effect* of state action is to *advance religion*. See *Tilton*, *supra*, at 679. This test acknowledges that sectarian schools perform a secular as well as religious function.

This position has been reaffirmed by this Court's recent decision in *Hunt v. McNair*, 413 U.S. 734 at 742-43 (1973) where Mr. Justice Powell stated for the Court:

41. "We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions." *Zorach v. Clauson*, 343 U.S. 306, 313-314 (1952).

42. In so doing the following have been upheld:

¶ the right of Catholic schools to fulfill compulsory educational requirements, *Pierce v. Society of Sisters*, 268 U.S. 510 (1925);

"To identify 'primary effect,' we narrow our focus from the statute as a whole to the only transaction presently before us.

Whatever may be its initial appeal, the proposition that the Establishment Clause prohibits any program which in some manner aids an institution with a religious affiliation has consistently been rejected. *E.g.*, Bradfield v. Roberts, 175 U.S. 291 (1899); Walz v. Tax Comm'n, 397 U.S. 664 (1970); Tilton v. Richardson, 403 U.S. 672 (1971).

Stated another way, the Court has not accepted the recurrent argument that aid is forbidden because aid to one aspect of an institution frees it to spend its other resources on religious ends."

And as the Chief Justice noted for seven members of the Court in *Norwood v. Harrison*, 413 U.S. 455 (1973) (holding unconstitutional a Mississippi statute insofar as it permitted the State to provide free textbooks to private schools which pursued racially discriminatory policies)

¶ transportation reimbursement payments to parents, *Everson v. Board of Education*, 330 U.S. 1 (1947);

¶ released time for religious instruction from public school, *Zorach v. Clauson*, 343 U.S. 306 (1952);

¶ textbook loans to nonpublic school children, *Board of Education v. Allen*, 392 U.S. 236 (1968);

¶ construction grants to sectarian institutions of higher learning, *Tilton v. Richardson*, 403 U.S. 672.

¶ revenue bonds for construction at sectarian schools, *Hunt v. McNair*, 413 U.S. 472 (1973).

In the non-educational area, there are many decisions affirming the constitutional propriety of state action that clearly benefits religious institutions without advancing religion:

¶ Grants to religious orders for hospitals, *Bradfield v. Roberts*, 175 U.S. 291 (1899);

¶ Sunday closing laws, *McGowan v. Maryland*, 366 U.S. 420 (1961);

¶ Tax exemption from property taxes, *Walz v. Tax Commission*, 397 U.S. 664 (1970).

the religious and secular functions of church schools can be separated:

> "Neither *Allen* nor *Everson* is dispositive of the issue before us in this case. Religious schools 'pursue two goals, religious instruction and secular education.' Board of Education v. Allen, *supra*, 392 U.S., at 245, 8Ł S. Ct. at 1927. *And, where carefully limited so as to avoid the prohibitions of the 'effect' and 'entanglement' tests, States may assist church-related schools in performing their secular functions, Committee for Public Education v. Nyquist*, pp. 774, 775; *Levitt v. Committee for Public Education*, post, at 481, not only because the States have a substantial interest in the quality of education being provided by private schools, see *Cochran v. Louisiana State Board of Education*, 281 U.S. 370, 375 (1930), but more importantly because *assistance properly confined to the secular functions of sectarian schools does not substantially promote the readily identifiable religious mission of those schools and it does not interfere with the free exercise rights of others*." 413 U.S. at 468. (emphasis added).

B. *The Allen Case Was Properly Decided and the Rationale Should Be Expanded, Not Contracted.*

Contrary to the appellants' assertion (appellants' brief, pp. 21-23), *Allen* comes well within the established guidelines discussed in the preceding sections of this brief.

Furthermore, we also take exception to appellants' statement that the generation of our founding fathers that wrote the Establishment Clause intended to bar the type of secular educational benefits involved in the instant litigation. Nothing could be further from the truth.

In the first place, it hardly need be pointed out that we

have experienced far reaching social and economic changes in this country since 1787.[43]

And if, as appellants suggest, it is time to revisit the Establishment and Free Exercise Clauses, may we respectfully suggest that the time has come to recognize and frankly admit that the real purpose of the religious clauses of the First Amendment was to insure that we would never in this country have an established Church, either of Rome or England; and that government should keep hands off of how we choose to practice or not practice our religion.[44]

To try to read into this classic document of great simplicity—our U.S. Constitution—prohibitions that would today bar the states from using public funds to upgrade the secular educational skills of all children, including those who may attend religiously oriented schools, is pure sophistry. It does great injustice to the wisdom and common sense of these great men—who had sense enough to know, as this Court has often repeated, that the Constitution is a living document—to be construed and interpreted, with common sense and reason, in the light of changing conditions and situations. As has been so well

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43. For example, the concept of free public education as we know it today was unheard of when the First Amendment was adopted. Thus the first public school with tax-supported funds was not even established in Philadelphia until 1802, and then only on a very limited basis and with great misgivings from the conservative elements. *History of Philadelphia*, Volume III, Scharf & Westcott, at p. 1924. The first public school district and school board for any extensive public school system was not established in Philadelphia until April 6, 1818.

44. As stated in *Everson*, "The 'establishment of religion' clause of the First Amendment means at least this:

> "Neither a state nor the Federal Government can set up a church.
>
> "Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another.
>
> "Neither can force or influence a person to go to or to remain away from church against his will or to force him to profess a belief or disbelief in any religion." 330 U.S. at 15.

stated and summarized by Mr. Chief Justice Hughes in *Home Building & Loan Assn. v. Blaisdell*, 290 U.S. 398 at 442-443:

> "It is no answer to say that this public need was not apprehended a century ago, or to insist that what the provision of the Constitution meant to the vision of that day it must mean to the vision of our time. If by the statement that what the Constitution meant at the time of its adoption it means to-day, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation. It was to guard against such a narrow conception that Chief Justice Marshall uttered the memorable warning—'We must never forget that it is a *constitution* we are expounding' (*McCulloch v. Maryland*, 4 Wheat. 316, 407)—'a constitution intended to endure for ages to come, and consequently, to be adapted to the various *crises* of human affairs.' *Id.*, p. 415. When we are dealing with the words of the Constitution, said this Court in *Missouri v. Holland*, 252 U.S. 416, 433, 'we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. . . . The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago.'"

We are far beyond the dangers of an established church or government controlled religion today. Any "support" to religious institutions which may be indirectly or incidentally supplied through the present legislation does not come within the First Amendment Prohibition.

The Establishment Clause was never intended to be, and is not now, either a "friend or foe" to any American; rather, it is a beacon light of neutrality which assures to each individual that the state will neither assist him nor

impede him in his religious beliefs. Acts 194 and 195 come precisely within these guidelines. They are completely neutral and apply across-the-board whether one has or does not have religious beliefs and whether a child or his parents desires to attain religious as well as secular education from a sectarian school.

C. Inquiry into the Religious Practices, if Any, of Schools Attended by Children Eligible for Benefits Under Acts 194 and 195 Would Violate Their Constitutional Rights.

We have previously pointed out in section II B(2) above that plaintiffs have failed utterly to establish that the effect of the legislation under attack is to advance religion. Furthermore, they have failed to establish that any of the nonpublic schools eligible children who attend, bear any resemblance to the religious profile alleged in paragraph 8 of their complaint, and incorrectly asserted as a proved fact at page 4 of their brief and elsewhere. And this is precisely as it should be—for any inquiry that would permit developing the degree of religious involvement, or absence of same of such schools would be not only irrelevant, but would constitute the most pervasive kind of entanglement and a violation of basic constitutional rights.

As noted earlier, there is no disqualifying provision in the Pennsylvania Acts that would require inquiry into, or bar furnishing, benefits to children because of the religious practices of the schools they attend.

Not only is such inquiry not required to pass muster under the Establishment Clause, but to do so would violate the parents' free exercise rights and their traditional freedom of choice and conscience in educating their children and in religion, as well as violate their right of privacy.[45]

45. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Baird v. State Bar of Arizona*, 401 U.S. 1 (1971); *Law Students Civil Rights Research Council, Inc. v. Wadmond*, 299 F. Supp. 117, 129 (S.D. N.Y. 1969) affirmed 401 U.S. 154 (1971); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

The individual's right to privacy and freedom of choice was reaffirmed in this Court's recent opinion in *Roe v. Wade*, 410 U.S. 113 (1973). As noted long ago in *Meyer v. Nebraska*, 262 U.S. 390, 399 (1922):

> "While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. [citations omitted]."

To the same effect, see *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) where the Court upheld the right of parents to provide for sectarian or non-sectarian training of their children. See also *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

Just as an individual has the right to be free from inquiry by the state into the contents of his library, the state cannot tell a man in the privacy of his home what books to read and cannot control a person's private thoughts, *Stanley v. Georgia*, 394 U.S. 557 (1969). So also, the state cannot inquire from a parent as to the reasons for his choice in educating his children or inquire of the school as to its religious practices, if any, to determine eligibility. Any such inquiry invades the private rights of parents as individuals. *Watkins v. United States*, 354 U.S. 178 (1957).

CONCLUSION

Appellants had an opportunity to offer whatever evidence they had—or could develop—to prove the serious allegations they have made. They offered none, and while relegated to arguing only facial unconstitutionality, their brief is peppered with unproved conclusory allegations and speculations—as absurd as the charge that some of the equipment or materials loaned for use in the industrial art program could be used "to construct crosses, crucifixes, and altars" (Appellants' brief, p. 30).

The fact is—and appellants know it,—that the programs under attack are purely educational and purely secular. They are benefits already available to public school children. Extending them to nonpublic school children is clearly a proper subject for public concern and public funds.

Plaintiffs final attack is one they do not really articulate because the authorities are so overwhelming against them. There is nothing in the First Amendment, and no case has ever held that public programs for the direct aid and benefit of an individual,—be they for education or general public welfare,—must exclude persons from benefits because they are enrolled in, or served by an institution that has a sectarian connection.

Happily what appellants contend for is not now the law of the land—and we ask Your Honorable Court to refuse to adopt such an argument that would overturn a long line of precedents to the contrary.

We respectfully urge Your Honorable Court to dismiss the present appeal and affirm the judgment of the court below.

Respectfully submitted,

DUANE, MORRIS & HECKSCHER

By

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